IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 292

GEORGE SMITH,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR PETITIONER

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On September 23, 1947, petitioner and the said corporation were indicted for conspiracy to violate the Emergency Price Control Act of 1942 (50 U. S. C. App. 901 *et seq.*) by selling finished piece goods at prices in excess of the ceilings established by O. P. A. regulation (R. 21-26). The two informations and the indictment were consolidated for trial (R. 28-32).

Petitioner and the said corporation were found guilty on 35 counts of each of the two informations, and were found guilty on the conspiracy indictment (R. 988-990). Petitioner and the corporation were fined $710,000,00 each and petitioner was sentenced to a total of three years' imprisonment.

The Court of Appeals, reversed the conviction of the petitioner in part with respect to 12 counts on each of the two informations on the ground that he had acquired immunity as to those charges by virtue of his testimony before the official of the Office of Price Administration, but his conviction on the remaining counts of the informations and the conspiracy indictment was affirmed. The partial reversal decreased the total amount of the fines imposed upon him by $240,000.00. Judge Learned Hand dissented from the affirmance of the petitioner's conviction on the indictment on the ground that he also acquired immunity as to that charge (R. 1038-1050).

The court below predicated the affirmance of the conviction in part on the ground that the alleged "volunteered statement" given by petitioner before the official of the Office of Price Administration, appearing earlier in a footnote, operated as a partial waiver of the immunity granted to him under the Compulsory Testimony Act.

Specification of Errors to Be Urged

The Court of Appeals erred:

(1) In holding that the immunity afforded petitioner by virtue of the Compulsory Testimony Act of February 11, 1893 (U. S. C. A. Title 49, Sec. 46), did not apply to the informations and the indictment as a whole, where the proof in support of which was obtained by leads rather than by direct testimony given by petitioner in his testimony before the official of the Office of Price Administration.

(2) In its misconception of the import of the testimony of petitioner, earlier quoted here as a footnote, by construing it to be a "voluntary statement" outside of the general claim made by petitioner at the outset of the hearing before the official of the Office of Price Administration, that all testimony given by him at the hearing was to be considered under the protective privilege of the immunity statute.

(3) In holding that petitioner gained no immunity upon the indictment under the Compulsory Testimony Act of February 11, 1893 (U. S. C. A., Title 49, Sec. 46), where in response to a question put to him by the official of the Office of Price Administration relating to the selling prices at which he disposed of the finished piece goods he refused to incriminate himself and instead suggested his innocence. (We reiterate, this question is the one raised by Judge Learned Hand in his dissenting opinion.)

POINT I.

One who, in obedience to a subpoena issued pursuant to the Compulsory Testimony Act of February 11, 1893, U. S. C. A., Title 49, Section 46, appears before an official of the Office of Price Administration, asserts his constitutional privilege and gives testimony under oath substantially touching the alleged offenses, obtains immunity from prosecution of those offenses.

Setting aside for the moment the questions of the alleged partial waiver (which will be considered under Point III), the petitioner, beyond dispute, was entitled to immunity from prosecution of the offenses lodged by the two informations and the indictment in question.

The petitioner brought himself within the scope of the statutory authorization, because the "transaction, matter or thing," concerning which he had testified had a substantial connection with the matters involved in his prosecution. Nowhere is it suggested or pretended that petitioner did not fully comply with the subpoena in this case nor that his testimony and the information produced was excessive, or that his claim of constitutional immunity was frivolous, insubstantial or not made in good faith.

We respectfully submit that it was the examiner's duty, when the petitioner claimed his privilege at the outset, to determine whether he wished to exchange immunity for testimony. If he did not wish to do so, he should have stopped further inquiry. He elected to take the other course.

So, for example, this court, in *United States* v. *Monia*, 317 U. S. 424, 430, stated thus:

> "Congress evidently intended to afford Government officials the choice of subpoenaing a witness and putting

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him under oath, with the knowledge that he would have *complete immunity* from prosecution respecting any matters substantially connected with the transactions in respect of which he testified, or retaining the right to prosecute by foregoing the opportunity to examine him." (Italics supplied.)

A brief review of the history of the statutes governing the provisions for immunity to a natural person as co-extensive with the immunity guaranteed under the Fifth Amendment of the United States Constitution is enlightening. Government agencies found themselves obstructed in the prosecution of suits against individuals and corporations because of witnesses claiming their constitutional privilege under the Fifth Amendment. Therefore, in order to aid the Government in obtaining necessary evidence, Congress adopted the Immunity Statute of February 25, 1868 (R. S. #860) which, in brief, provided that no evidence obtained from a witness could be used against him in a criminal proceeding.

In *Counselman* v. *Hitchcock*, 142 U. S. 547, the Supreme Court declared this Immunity Statute unconstitutional because the immunity granted thereby was not co-extensive with the Fifth Amendment. The Court pointed out on page 564 that the Statute would not

"prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such Court. It could not prevent the obtaining and the use of witnesses and evidence which should be applicable directly to the testimony which he might give under compulsion, and on which he might be convicted, when otherwise, and if he refused to answer, he could not possibly have been convicted."

OTHER AUTHORITIES CITED:

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BRIEF FOR PETITIONER

Opinions Below

The majority and dissenting opinions in the Court of Appeals are reported in 169 F. 2d 856 (R. 1038-1030). There was no opinion in the District Court for the Southern District of New York.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

The judgment of the Court of Appeals was entered August 23, 1948 (R. 1050). The petition for Writ of Certiorari was filed September 22, 1948. Certiorari was granted on December 6, 1948.

Questions Presented

1. Whether petitioner, George Smith, having given his testimony *viva voce* before an official of the Office of Price Administration on April 30, 1946, in obedience to a subpoena, and having seasonably asserted his constitutional privilege against self-incrimination, thereby purchased full and complete immunity under the Compulsory Testimony Act of February 11, 1893, U. S. C. A. Title 49, Section 46, concerning the transactions, matters and things, to which he testified and which the Government made the basis of the charges set out in the informations and indictment, leading to his conviction for illegal extension of preference ratings and illegal diversion of textiles so procured and conspiring to sell finished piece goods at prices in excess of the minimum established therefor.

2. Did the immunity gained by the petitioner by virtue of the Compulsory Testimony Act of February 11, 1893, U. S. C. A. Title 49, Sec. 46, apply only to the use of the actual testimony given by the petitioner at the hearing before an official of the Office of Price Administration, or did it extend to all charges, the proof of which was made dependent upon leads given by the petitioner in his testimony before the aforesaid official which resulted in his ultimate conviction.

3. May it be contended that the statement (quoted as a footnote below) given by the petitioner on the hearing before an official of the Office of Price Administration, which was found by the Court of Appeals to operate as a partial waiver of his immunity, was broad enough to justify the

decision of the Majority Court in the affirmance in part of the conviction of the petitioner.

4. May it be contended that the immunity granted to the petitioner under the Compulsory Testimony Act of February 11, 1893, U. S. C. A. Title 49, Sec. 46, is lost where he, in response to the question put to him by the official of the Office of Price Administration, refused to incriminate himself and instead refuted the accusation. (This question is the one raised by Judge Learned Hand in his dissenting opinion.)

Statutes Involved

Section 202(g) of the Emergency Price Control Act of 1942, as amended, 56 Stat. 23, 58 Stat. 632, 50 U. S. C. App. 922(g) provides:

* * * * *

(g) No person shall be excused from complying with any requirements under this section because of his

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Footnote:

"Question: So that with respect of Daisart Sportswear Inc., contracting activities on ammunition bag materials, were shipped by the manufacturer without bill?

Answer: It was not. Metals Disintegrating Company being a foreign concern and being unable to furnish this material, they asked me to purchase materials for them. They were aware that I cannot do that without proper priorities. Those priorities were forthcoming in a blanket sum. No stipulated amount and I was further told to maintain a constant stock for any orders they may call for. Their orders came to sometimes dated and never in any set size or specified form. They charged from day to day. I then went about purchasing material for their work. When and if I had a surplus, I would notify them and ask them if they had anything immediately on hand as I am overstocked, at which time they told me they had not and to dispose of it.

Question: This is a voluntary statement. You do not claim immunity with respect to that statement?

Answer: No."

privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934, edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

The Compulsory Testimony Act of February 11, 1893, 27 Stat. 443, 49 U. S. C. 46, provides:

> That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or of any Amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required to him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

* * * * *

Nature of Informations, Indictment, and Resulting Conviction

The first information was of forty-one counts, and it in substance alleged that the petitioner and the co-defendants had unlawfully and wilfully failed to utilize textiles, received as a result of the application or extension of preference ratings, for a prescribed or permitted use. The second information, of a like number of counts, alleged that the petitioner and the co-defendants had unlawfully and wilfully applied and extended preference ratings for textiles which they were not entitled to apply or extend. Finally, the indictment charged them with conspiring to sell finished piece goods at prices in excess of the minimum established therefor.

The indictment and the two informations were consolidated for trial. All were found guilty on the indictment. On the two informations, however, certain counts were eliminated either by action of the court or upon verdict of not guilty, so that petitioner was found guilty on thirty-five counts of each. Fines aggregating $710,000 were thereupon imposed on petitioner, and in addition he was sentenced to a total of three years' imprisonment.

On appeal to the United States Circuit Court of Appeals for the Second Circuit, the majority court (the opinion being written by Judge Clark and concurred in by Judge Swan), reversed the conviction of the petitioner upon Counts 1-4, 7, 11, 14, 16, 17, 20, 24, and 30 of each information, and affirmed as to the balance. This in effect reduced the fine by the sum of $240,000, but did not affect his prison sentence.

Learned Hand, Circuit Judge, in a dissenting opinion, agreed with the majority court except as to the conviction of petitioner upon the indictment which in his opinion he stated should have been reversed.

Statement

The petitioner, on April 30, 1946, in response to a subpoena, in his individual capacity (R. 850) appeared before an official of the Office of Price Administration, accompanied by his counsel. Petitioner, after being duly sworn as a witness, and after stating his name, address, place of business and his connections with the predecessor to the Daisart Sportswear, Inc., advised the representative of the Office of Price Administration who conducted the investigation that he was claiming his right of immunity under the relevant Statute, and that such claim of amnesty would apply to all questions thereafter put to him on such examination and the answers made by him in response thereto.

On this subject the following colloquy took place:

"Mr. Turtz (official of O. P. A. conducting the inquiry): At this point, Mr. Smith stated that he thought he had a blanket privilege. Mr. Turtz stated that no privilege having been claimed up to this point no immunity would result with respect to the answers made to the questions propounded.

Mr. Smith: I want to claim privilege as to anything that I say.

Mr. Turtz: Up to this point in the record there has been no claim made by you with respect to any privilege or immunity?

Mr. Smith: Correct.

Mr. Turtz: Your counsel has stated to you that with respect to any question which you feel the answer will tend to incriminate you, you have to make the request for privilege yourself. In other words, at this point, Mr. Smith, you are making a request for privilege with respect to any question that I propound to you, except

as to those questions which I have already propounded?

Answer: That's correct" (R. 1011, 1012).

A perusal of the testimony given by petitioner before the official of the Office of Price Administration (Government's Exhibit 147-A, R. 1009), will disclose that the petitioner was plied with various questions and that the answers given by him had a telling effect in the sense that his evidence had been used to work up the case against him; in short, that he had been compelled by that testimony to supply the facts on which the Government a year later predicated the informations and indictment and later proved his guilt.

Petitioner revealed that prior to 1944 he conducted business under the assumed name of Daisart Manufacturing Company; that thereafter Daisart Sportswear, Inc., a New Jersey corporation, succeeded to the business of the Daisart Manufacturing Company; that he was the sole stockholder, officer and director of Daisart Sportswear, Inc.; that Daisart Sportswear, Inc. was engaged in the business of manufacturing, purchasing and selling of textiles and kindred products; that Daisart Sportswear, Inc. was a contractor for the Metals Disintegrating Company which was under contract to manufacture ammunition bags directly for the United States Government; that it was also a contractor for many other concerns, to wit:

Lenn Sportswear, Inc.
Mickey Finn Clothing
Kit Packing Co.
London H.C. Co.
London Vest Co.

He also revealed the names of the concerns to whom he extended said priorities, to wit;

A. Steinman & Co., 4th Avenue, New York City
L. Lazarus & Co., New York City
Southeastern Cottons

It is significant to point out that in addition to revealing the names of the above firms, the petitioner also disclosed that there were several other firms involved. The petitioner was asked the following questions by the interrogator and gave the following responses:

"Question: In connection with its manufacturing operations, Daisart Sportswear Inc., had to acquire certain materials and fabrics? Can you give me the names of the persons or firms from whom those fabrics were purchased?

"Answer: A. Steinman & Co., 4th Avenue, New York City; L. Lazarus & Co., New York City; Southeastern Cottons. *There are several others but I cannot remember them.*

"Question: *There were others?* And in connection with its purchases from the firms that you have mentioned *and with respect to those which at the moment you don't recall,* did Daisart Sportswear Inc., receive invoices from these suppliers?

"Answer: They did" (R. 1021). (Emphasis supplied.)

It is thus clear that petitioner testified that Daisart Sportswear Inc. received invoices from the named suppliers as well as other unnamed suppliers in connection with the purchase of goods.

He also testified that the payments for the purchase of material were made by corporate check drawn on the bank of Daisart Sportswear, Inc., namely Fidelity Union Trust Company, Newark, New Jersey (R. 1021).

We stress the foregoing for the reason that by the above testimony, the Government was informed not only of the named suppliers, but in addition that there were other suppliers whose names the petitioner could not identify at the moment. The Government could thus discover by an examination of the records of Daisart's bank, namely Fidelity Union Trust Company, Newark, New Jersey, which was in possession of such records, the unnamed suppliers. Thus fortified the Government was able to trace the companies which were the unnamed suppliers of the petitioner. In this manner the Government was able to set out the various counts in each of the two informations and ultimately obtain his conviction thereon.

In order to obtain a conviction under the informations it was incumbent upon the Government to establish the following facts:

A. The dealing with the Metal Disintegrating Company.

B. The use of blanket preference rating to obtain the desired commodities.

C. The companies from which the materials had been purchased.

D. The disposal of the surplus stock.

E. The companies to which it had been sold.

In order to obtain a conviction under the indictment it was incumbent upon the Government to establish the following facts:

A. That he was in possession of certain textiles.

B. That he sold textiles.

C. That the sale price was in excess of the permissible maximum price.

An examination of the Government's Exhibits 155-158 inclusive, which were prepared by an accountant emanating from the F.B.I. reveals how the Government was able to build up its case from the clues furnished by petitioner. These exhibits consist of schedules indicating, among other things, the names of the concerns from which petitioner had purchased merchandise under priority orders, and the sales made by petitioner. This is particularly so in reference to Exhibit 158, which related to separate counts of the information and the indictment, and traces the goods from petitioner's suppliers to his ultimate buyers. The buyers were traced as a result of an examination of the books of the suppliers, to wit, Steinman, Southeastern, Lazarus and others. Suffice it to say that a study of the exhibits mentioned will disclose the fact that petitioner's testimony elicited from him by the official from the Office of Price Administration, which among other things revealed that he purchased goods from Steinman, Lazarus and Southeastern, furnished the clues which led the Government directly to the purchasers.

On March 31, 1947, two informations of 41 counts each were filed against petitioner and Daisart Sportswear, Inc., charging them with the unlawful application and extension of preference ratings in the purchase of textiles and with the illegal diversion of the materials to other than certified uses, in violation of Section 301 of the Second War Powers Act (56 Stat. 177; 58 Stat. 827; 60 Stat. 868; 50 U. S. C. App. 633) (R. 15-20).

A new statute was then passed by Congress, the Act of February 11, 1893, and incorporated in the Emergency Price Control Act of 1942 (Section 202, subdivision g).

This act was declared constitutional in *Brown* v. *Walker*, 161 U. S. 591, holding that the Fifth Amendment does not deprive Congress of the power to compel the giving of testimony or the production of books and records, even though said testimony or books and records might incriminate the witness, *provided* that immunity be accorded the witness and that said immunity was complete and in all respects commensurate with the protection guaranteed by the constitutional limitation. The court stated that this immunity statute was one of general amnesty and the desired protection of the Constitution was fully accomplished.

This holding was reiterated by the Supreme Court in numerous other cases including *Glickstein* v. *United States*, 222 U. S. 139, wherein the Court stated on page 141:

> "It is undoubted that the constitutional guaranty of the Fifth Amendment does not deprive the law-making authority of the power to compel the giving of testimony, even though the testimony, when given, might serve to incriminate the one testifying, provided immunity be accorded, the immunity to be complete; that is to say in all respects commensurate with the protection guaranteed by the constitutional limitation."

In support of this oft-repeated proposition, the court cites:

> *Brown* v. *Walker*, 161 U. S. 591;
> *Burrell* v. *Montana*, 194 U. S. 572;
> *Jack* v. *Kansas*, 199 U. S. 372;
> *Ballmann* v. *Fagin*, 200 U. S. 186;

Hale v. *Henkel*, 201 U. S. 43;
Heike v. *United States*, 217 U. S. 423.

In the case at bar it is conceded that the petitioner when appearing before the official of the Office of Price Administration for the purpose of giving testimony pursuant to the directions of the subpoena served upon him, affirmatively claimed immunity.

It is not essential that the Government should have received information with respect to all elements necessary to establish the guilt of your petitioner from the information supplied by him to the official of the Office of Price Administration. It is sufficient that the Government may have, not that it should have. This had been the law since at least the time of Chief Justice John Marshall, who stated in the famous Aaron Burr trial (1 Burr's Trial, p. 244):

> "Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case, that a witness by disclosing a single fact may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe, but draw it from thence and he is exposed to a prosecution. The rule which declared that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description.

> What testimony may be possessed, or is obtainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

We do not mean to assert that any innocuous testimony given by a witness, such as the giving of one's name or residence, would invade his legal rights against self-incrimination. The evidence obviously must be of a more substantial nature which would go to the substance of the prosecution itself.

In *Doyle* v. *Hofstader*, 257 N. Y. 244, Judge Cardozo of the New York Court of Appeals, afterward a United States Supreme Court Justice, expresses the thought at page 493 in the following language:

> "'A witness is not required to show, in order to make his privilege available, that the testimony which he declines to give is certain to subject him to prosecution, or that it will prove the whole crime, unaided by testimony from others. It is enough, to wake the privilege into life, that there is a reasonable possibility of prosecution, and that the testimony, though falling short of proving the crime in its entirety, will prove some part or feature of it, will tend to a conviction when combined with proof of other circumstances which others may supply.'"

In his summation, the Government's attorney, for the purpose of establishing the allegations under the first information No. C-125-239, that priorities were used, quoted from the testimony of petitioner before the Office of Price

Administration. After reading petitioner's testimony that priorities were used, he informed the jury:

> "I think it is clear from this statement that with regard to any other work that Daisart was doing at the time, according to this one statement, it was doing the work as a contractor on materials furnished by others, but that insofar as work done for Metals, that material came to them by reason of purchases authorized by the priorities now in question.
>
> So that we have a more or less firm and I would say almost absolute basis which is unassailable for the assumption that the only logical and the only legal basis for the application of these priorities was the authority, such as it was, which was received by Daisart through Metals Disintegrating Company" (p. 919).

Again, in his summation, the Government's attorney, for the purpose of establishing the allegations of the second information No. C-125-240, that the petitioner failed to utilize the textiles for the purpose represented, referred to his testimony before the Office of Price Administration, and concluded by saying:

> "* * * And there again we rely upon a sworn statement made in behalf of the corporation which appears in Exhibit 147-A, page 17" (p. 935).

Still further in his summation, the Government's attorney, for the purpose of establishing the allegations of the indictment No. C-125-295, that the petitioner violated the maximum price regulations, prefaced the following remarks:

> "If there be any question about the fact that there was knowledge on the part of Daisart and all those involved in this case with regard to the limitations upon the price of sales, we have only to turn to 147-A * * *" (p. 953).

and after reading petitioner's testimony, he continued:

> "It was almost clear to a certainty that the limitation with regard to price was within the minds of the individuals here, but I say we go one step further; we are not limiting ourselves to cost" (p. 953).

Likewise, the Government's attorney must have surely believed that the testimony given by petitioner was incriminating in nature, for he used such testimony very effectively in his summation, in which he stated:

> "The only case in which he had any authority whatsoever was that relating to the work done by Metals Disintegrating Company. And at no time, at no time was there any claim made that there was any other justification for the ordering of this material except the work done for Metals Distintegrating Company.
>
> Now, certainly, there wasn't any reason which one can logically point to which would prevent Daisart or Smith from disclosing the fact that he had used it in connection with other rated work, and yet never was that explanation made. Why? The reason is apparent in that sworn testimony" (p. 933).

And in another place:

> "Q. And with respect to ammunition bags? A. Since the ammunition bags were never in a set or standard

size, the waste in most instances almost equalled the amount actually used.

I am willing to take that statement at its face value, and I say to you, double the 50,000 and you will have 100,000, and I say to you that the net result is not changed one whit (pp. 935, 936). * * *

If there be any question about the fact that there was knowledge on the part of Daisart and all those involved in this case with regard to the limitations upon the price of sales, we have only to turn to 147-A, and we find at page 13, in behalf of the corporation, the following:

Q. Can you tell me how Daisart Sportswear, Inc. arrived at its selling price with respect to the items that it sold? A. Since it was surplus, it was sold at the price billed to me plus freight and haulage and less discount allowed to me.

Q. In other words, Daisart Sportswear, Inc. sold at cost plus freight less any discounts, cash or otherwise, received by Daisart Sportswear, Inc.? A. Correct" (p. 953).

From the petitioner's testimony given before the official of the Office of Price Administration, the Government was able to obtain leads which led it directly to the essential proof on the question of over-ceiling price at which the finished goods were sold. For example, petitioner testified from whom he had purchased the textiles, and the Government, by means of this testimony, was able to trace the purchasers and from them ascertain the price paid to the Daisart Sportswear, Inc. for the finished goods.

This is apparent from an examination of Exhibits 155-158 inclusive, which were prepared by an accountant for the F.B.I. It will be recalled that petitioner; in his testi-

mony before the official of the Office of Price Administration, identified the firms of Steinman, Lazarus, Southeastern and others as firms from which he purchased priority material, and that such disclosures were the clues which led the Government directly to the purchasers. This becomes clear from the Government attorney's summation (ff. 2811-2812) in which, referring to Exhibit 158, he states:

> "Let us pause at this point to evaluate that bit of information. In order to trace this material, it was necessary not only to establish the source of the material to the various suppliers, but it was also necessary to establish to whom they had been sold or delivered eventually."

The Government using the information supplied by petitioner relating to the source of supply, located the purchasers and ascertained that a price in excess of the ceiling price had been paid.

The *nisi prius* court, to be sure, believed the evidence given by petitioner before the official of the Office of Price Administration to be incriminating. On no other basis could the court's ruling be explained in excluding this testimony against him.:

> "The Court, therefore, rules as to the defendant, George Smith, that the statement and exhibit 147-A is not admissible as against him" (R. 850).

As pointed out, the matters and things about which petitioner testified were directly connected with and formed an essential link, if not the entire chain of circumstances, relied upon for conviction. The Government recognized this verity when it stated the following in its memorandum

submitted in opposition to the Certiorari, at page 10 thereof:

> "Petitioner Smith concededly gave testimony before the O. P. A. official which substantially related to the transactions which were the subject of the indictment and the informations. If, therefore, his testimony had been compelled, he would have acquired immunity from prosecution for those offenses."

Finally, the majority court, speaking of the informations, in effect stated:

> "His claim (referring to petitioner) of immunity would therefore be clear except for the circumstance, now to be stated, of his waiving immunity as to part of his testimony * * *" (169 F. 2d 856, 860).

The testimony given by petitioner at the hearing before the official of the Office of Price Administration did not touch "remote possibilities out of the ordinary course of law" (*Heike* v. *United States*, 272 U. S. 131), but on the contrary involved proofs which were germane and relevant to the establishment of the offenses before the trial court. Such being the case, petitioner by testifying compulsorily before the official of the Office of Price Administration, gained the prescribed immunity afforded him under the Compulsory Testimony Act.

In closing, "the resort to immunity statutes seems to have proved itself a valuable and satisfactory aid in the ascertainment of facts in many cases. * * * They are entitled to the fullest faith and credit that a fair construction of their language permits. Else they become pitfalls for the unwary" (Pound, *J.*, *Matter of Doyle*, 257 N. Y. 244, 272).

POINT II

Under Point I petitioner contended that having appeared before an official of the Office of Price Administration in obedience to a subpoena served upon him in his individual capacity and having asserted his constitutional privilege with respect to the compulsory giving of testimony under oath touching both the two informations and the indictment, he thereby gained immunity from prosecution as to all of these offenses. However, since the majority judges of the Court of Appeals, as respects the indictment, held that since petitioner in his answer refused to incriminate himself as to the over-ceiling prices and instead refuted the accusation, petitioner gained no immunity under the statute, petitioner under this Point contends that the majority judges in this respect were in error and that the rule that petitioner acquired immunity as to the indictment even though he did not admit his guilt, as enunciated by Judge Learned Hand in his dissenting opinion, is sound.

It will be noted that the majority opinion took the position that although the over-ceiling price was an essential element in the proof of the indictment, that since petitioner refused to incriminate himself, and instead refuted the accusation, petitioner could gain no immunity under the statute. Judge Learned Hand, in disagreement with his colleagues, and in voting for a reversal as to the indictment, indicated that since petitioner had testified as to the sale price of the finished piece goods, he testified on account of a "transaction" which related to the indictment in obedience to a subpoena, and even though petitioner's answer refused to admit his guilt, protesting rather his inno-

cence, he was nevertheless entitled to the immunity afforded him by the statute. We can do no better than in support of this point than refer this Honorable Court to the opinion written by Judge Learned Hand. (For this Court's convenience we append Judge Hand's opinion hereto.)

If more need be said, the statute itself is a complete answer in proof that petitioner is entitled to immunity, no matter which way his answer goes.

Implicit in the statute is that those who answer admitting guilt, as well as those who deny guilt, are entitled to immunity. In no other way can there by given effect to the provision of that portion in the statute (Compulsory Testimony Act of February 11, 1893, 49 U. S. C. A., Sec. 46) reading:

> "Provided, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

The net effect of the quoted portion is that immunity is to be granted in any event. The punishment to be visited upon the offender, however, is that he may be prosecuted for perjury in giving false answers.

POINT III

Petitioner did not by the so-called volunteered statement at the hearing conducted by the official of the Office of Price Administration, waive or surrender the immunity which he expressly claimed at the outset under the Compulsory Testimony Act.

As already noted, petitioner, on April 30, 1946, in response to a subpoena served upon him in his individual capacity appeared before an official of the Office of Price Administration, accompanied by his counsel. Petitioner, after being duly sworn as a witness, and after stating his name, address, place of business and his connections with the predecessor to the Daisart Sportswear, Inc., advised the representative of the Office of Price Administration who conducted the investigation that he was claiming his right of immunity under the relevant Statute, and that such claim of amnesty would apply to all questions thereafter put to him on such examination and the answers made by him in response thereto.

On this subject the following colloquy took place:

> "Mr. Turtz (official of O. P. A. conducting the inquiry): At this point, Mr. Smith stated that he thought he had a blanket privilege. Mr. Turtz stated that no privilege having been claimed up to this point no immunity would result with respect to the answers made to the questions propounded.
>
> Mr. Smith: I want to claim privilege as to anything that I say.
>
> Mr. Turtz: Up to this point in the record there has been no claim made by you with respect to any privilege or immunity?

Mr. Smith: Correct.

Mr. Turtz: Your counsel has stated to you that with respect to any question which you feel the answer will tend to incriminate you, you have to make the request for privilege yourself. In other words, at this point, Mr. Smith, you are making a request for privilege with respect to any question that I propound to you, except as to those questions which I have already propounded?

Answer: That's correct" (R. 1011, 1012).

Petitioner having thus asserted his constitutional privilege against self-incrimination, was thereafter interrogated, and while it was expressly understood that such privilege was still claimed, the following question was put to petitioner:

"Question: So that with respect to Daisart Sportswear, Inc., contracting activities on ammunition bag materials (the materials), were shipped by the manufacturer without bill?"

and the following response given:

"Answer: It was not. Metals Disintegrating Company being a foreign concern and being unable to furnish this material, they asked me to purchase materials for them. They were aware that I cannot do that without proper priorities. Those priorities were forthcoming in a blanket sum. No stipulated amount and I was further told to maintain a constant stock for any orders they may call. I mean Daisart Sportswear, Inc., for any orders they may call for. Their orders came to me sometimes dated and never in any set size

or specified form. They charged (sic) from day to day. I then went about purchasing material for their work. When and if I had a surplus, I would notify them and ask them if they had anything immediately on hand as I am overstocked, at which time they told me they had not and to dispose of it."

At this juncture, while the above answer was still within the purview of petitioner's claim of privilege, the examiner made the following gratuitous statement:

"Question: This is a voluntary statement. You do not claim immunity with respect to that statement?"

To this statement, petitioner answered as follows:

"Answer: No."

It is this last answer "No" to the statement of the interrogator which the Government claims constituted a waiver of petitioner's privilege.

This statement of the interrogator may be compared to hitching a horse and a cow into the same harness. A careful reading of this so-called question, to which the answer "No" was given, indicates that it contained two statements. The first sentence in the so-called question is: "This is a voluntary statement." If the answer "No" is to be applied to this first sentence, obviously it means that it is not a voluntary statement. The next sentence in the so-called question is: "You do not claim immunity with respect to that statement." If the "No" answer is to be applied to this latter sentence, then a waiver of immunity might be spelled out. As we understand the rule, however, a waiver is not to be inferred. It is only to be found to exist when it is plain, concise, clear and unequivocal (27 R. C. L.

Sec. 6, p. 909; *G. S. Johnson* v. *Nevada Packard Mines Co.*, 272 F. 291, 305).

This much was obviously recognized by the trial judge who excluded the entire testimony given by petitioner before the official of the Office of Price Administration, by holding:

> "That was the statement of the examiner and I will resolve that question in favor of the defendant, George Smith (referring to petitioner) and I will exclude the entire statement as to the defendant, George Smith (referring to petitioner) including that one answer" (R. 854-855).

Thus, the trial court in fact ruled "that there was no voluntary statement" by petitioner. The Government's attorney raised no objection to this ruling, nor did he contend that petitioner had waived the privilege claimed by him at the outset of the examination.

Accordingly, we find no basis for the statement by the Majority Court of Appeals that "a more reasonable approach is to apply the waiver to the extent and in accordance with the intent of the witness, as the examiner accepted it at the time."

It must be emphasized that the Government is seeking to spell out a waiver by petitioner of a basic constitutional privilege. In criminal cases basic constitutional protections should not be suspended by mere inferences from indifferent or doubtful facts (*Wood* v. *United States*, 128 F. 2d 265, 277).

In fact, every reasonable intendment is indulged against the waiver of fundamental rights, and courts do not presume acquiescence in their loss (*Hodges* v. *Easton*, 106 U. S. 408; *Johnson* v. *Zerbst*, 304 U. S. 458).

In construing an amendment of nearly identical import Amendment 6 of the United States Constitution, according to an accused the assistance of counsel—this court, in *Johnson* v. *Zerbst*, 304 U. S. 458, at p. 464 said:

> "It has been pointed out that courts indulge every reasonable presumption against waiver of fundamental constitutional rights' and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

In support thereof the court cites:

> *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389, 393;
> *Hodges* v. *Easton*, 106 U. S. 408, 412;
> *Ohio Bell Tel. Co.* v. *Public Utilities Comm.*, 301 U. S. 292, 307.

And in construing another amendment of nearly identical import—Amendment 4 of the United States Constitution, according an individual protection against unreasonable search and seizure—the court said, in *Nueslein* v. *District of Columbia*, 115 F. 2d 690, at 695:

> "The rights of the defendant under the IVth Amendment have been infringed and he has not waived those rights. Before a court will hold that a defendant has waived his protection under this Amendment, there must be convincing evidence to that effect."

In support thereof, the court cites:

> *United States* v. *Kelih*, 272 F. 484;
> *United States* v. *Lydecker*, 275 F. 976.

To the same effect see also *Gibson v. United States*, 149 F. 2d 381, 383, certiorari denied, 326 U. S. 724.

Moreover, since the Government's attorney did not raise the issue that the statement made by petitioner was voluntary in whole or in part, his trial counsel was placed in the position where it was unnecessary, in fact impossible, to raise any issue as to the meaning of the question and answer which is now characterized as a "voluntary statement". Nor could petitioner's counsel call petitioner to testify as to his intent with respect to the claiming of or waiving of immunity. The trial court had already decided that issue in favor of petitioner, which, we repeat, was without objection or argument by the Government's attorney.

This question, therefore, should not have been considered *de novo* by the Court of Appeals.

In conclusion, what the court said in *McCrea v. Jackson*, 148 F. 2d 193, at page 197, seems apposite here: " * * * The voluntary waiver of a constitutional right, where a man's personal liberty is concerned is not to be lightly assumed."

FINAL POINT

For the foregoing reasons, the conviction of petitioner, George Smith, should be reversed, the informations and indictment dismissed, and the petitioner, George Smith, discharged.

Respectfully submitted,

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APPENDIX

L. HAND, *Circuit Judge* (dissenting in part):

I agree with my brothers except as to the conviction of Smith upon the indictment, which I think ought also to be reversed. The language of the act* is that no one shall be prosecuted "on account of any transaction * * * concerning which he may testify * * * in obedience to * * * subpoena." There can be no debate that Smith was questioned and testified "concerning" the prices at which the company sold; and, as the indictment was for conspiring to sell at higher prices than the regulations allowed, his testimony inevitably "concerned" the "transactions" charged in the indictment. On the other hand, not only did his answers not support the charge, but they at least tended to refute it: I shall assume that they did refute it. Laying aside the "waiver" for the moment, we should have to hold, in order to affirm the conviction, that, when it has been ascertained that a witness's answers to questions "concerning" a "transaction," which may or may not be criminal, will not incriminate him—*a fortiori* when they exculpate him—he must answer. It is true that this is in accord with the following passage in Wigmore,** although he was only giving the reasons why such statutes do not give immunity to a witness who answers falsely: "The privilege, by hypothesis would have been violated only if the witness had truly confessed his crime, but if he denies it and falsely exonerates himself, he has confessed no fact 'against himself' " and "his privi-

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* §46, Title 49, U. S. C.

** Wigmore on Evidence, §2282(c).

lege has not been infringed by the actual answer." Apparently there are no decisions supporting this statement, and I cannot agree with it. The privilege, if it is to exist at all, must include all questions which are relevant to the witness's guilt, regardless of how he will answer them. Were it otherwise, the privilege itself would be conditional upon the answers, and the witness, in order to assert it, would be obliged to disclose whether he would deny or admit any guilt. It is precisely to protect him from that predicament that the privilege exists; indeed, the result would be to compel him, if he was in fact guilty, either to confess his guilt, or to add perjury to it.

I do not understand that we are committing ourselves to this position; on the contrary we are expressly refusing to do so; but this we do only because we hold that the "volunteered statement" included the "transactions" defined as crimes in the indictment. In doing so are we not giving to the only relevant passage in the "statement" a wider scope than is justified? All that it contained, touching the charge in the indictment, is the following passage: "When and if I had a surplus, I would notify them and ask them if they had anything immediately on hand as I am overstocked, at which time they told me they had not and to dispose of it." That did indeed allow the use of any of Smith's earlier or later testimony to the same effect, but as a "waiver" it went no further. The "statement" said nothing "concerning" the prices at which the "surplus" was sold, and Smith had already been questioned about those and had answered. I

quote his testimony in the margin.* It seems to me that he did not "waive" his immunity by "volunteering" that all he sold was "surplus"; for a "waiver" must extend to all the essentials of the charge from whose prosecution the act gives him immunity. The sales price was the very kernel of that charge.

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* "Question: But you do state the fact to be that sales of materials and fabrics were made by Daisart Sportswear Inc.?

"Answer: Correct.

"Question: Can you tell me how Daisart Sportswear Inc., arrived at its selling price with respect to the items that it sold?

"Answer: Since it was surplus, it was sold at the price billed to me plus freight and haulage and less discount allowed to me.

"Question: In other words, Daisart Sportswear Inc., sold at cost plus freight less any discounts, cash or otherwise, received by Daisart Sportswear Inc.?

"Answer: Correct.

"Question: For the year 1945, what was the dollar volume of sales of fabrics and materials made by Daisart Sportswear Inc.?

"Answer: I have no knowledge of that. Without records I cannot tell.

"Question: Are there such records available?

"Answer: There are not to my knowledge.

"Question: Can you tell the names of the persons or companies who purchased fabrics or piece goods or materials from Daisart Sportswear Inc.?

"Answer: Off hand I don't know. Not without consulting records.

"Question: You don't remember the names?

"Answer: Not off hand. I could name some, but I would rather not answer."